IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD L. SUGGS, Petitioner-Appellant, vs. LAWRENCE E. WILSON, Warden, San Quentin State Prison, Respondent-Appellee.	)	No. 22314

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28 United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts:

Appellant, Edward L. Suggs, was convicted of burglary in the first degree upon his plea of guilty in the Superior Court of the State of California for the County of Los Angeles and on March 11, 1954, was sentenced to state prison for the term prescribed by law.

On January 7, 1954, a preliminary hearing was held in the Municipal Court for the Los Angeles Judicial District at which time appellant was held to answer in the superior

court on an information charging burglary and assault with intent to commit rape. See Exhibits C and B (July 5, 1967).[1/] Appellant, represented in the superior court by the Public Defender, regularly entered a plea of guilty as charged in Count 1 of the information. See Exhibit B (March 7). The minute order of that day reflects that the superior court found the burglary to be second degree and set the matter for sentence.

On March 11, 1954, the superior court denied appellant's application for probation and pronounced judgment and sentenced appellant on his plea of guilty as charged in Count 1. Within half an hour the superior court noted that the minute order of January 22, 1954, through clerical inadvertence, did not properly reflect the order of the court. The minute order of January 22, 1954, was corrected nunc pro tunc to read "The Court finds the crime to be Burglary of the 'first degree' instead of the 'second degree'." See Exhibit B (March 7).

Petitioner excused his failure to appeal this conviction in his original petition to the district court on the grounds that he had not been advised of his right to appeal. See page 3 of Petition for Writ of Habeas Corpus.

Appellant's petition for writ of habeas corpus filed with the California Supreme Court was denied without opinion on April 5, 1966.

B. Proceedings in Federal Courts:

On December 5, 1966, appellant filed a petition for

1. All references are to the Exhibits attached to appellee's returns in the District Court, and are denominated by the date of the return to which they are attached, i.e. either March 7 or July 5.

writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, Case No. 46107. On that same date an order to show cause was issued. Appellee, respondent below, filed a return to the order to show cause on March 7, 1967. The District Court issued an interim order on May 12, directing appellee to produce additional records. Appellee complied with this interim order on July 5, 1967, by filing a return to the interim order and supplemental points and authorities in opposition to the petition for writ of habeas corpus.

No traverse was filed to appellee's returns, and on August 2, 1967, the District Court denied the writ for habeas corpus, discharged the order to show cause, and dismissed the proceedings, concluding that appellant had been properly sentenced by the California Superior Court.

On October 17, 1967, the United States District Court issued a certificate of probable cause to appeal and on the same day appellant filed his notice of appeal.

C. Statement of Facts:

On January 3, 1954, appellant entered the Logan home about 3 o'clock in the morning and assaulted Mrs. Logan with intent to rape her. See Exhibit C (July 5). The preliminary hearing, a reporter's transcript of which is Exhibit C (July 5), was held on January 7, 1954, and appellant was held to answer in the superior court on an information charging him in count 1 with burglary and in count 2 with assault with intent to commit rape.

On January 22, 1954, petitioner appeared before the

superior court and entered a plea of guilty to Count 1 [burglary, California Pen. Code § 459]. Throughout all proceedings in the state courts appellant was represented by the public defender. See Exhibit B (July 5) and Exhibit B (March 7).

The minute order for January 22, 1954, reflects that upon petitioner's entry of plea the court found the burglary to be of the second degree. See Exhibit B (March 7).

On March 11, 1954, petitioner appeared before the superior court and sentence was pronounced as follows:

> "Defendant is sentenced to the State Prison for the term prescribed by law and remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino." See Exhibit B (March 7).

Later the same day the minute order reflects the following transaction:

> "It appearing through clerical inadvertence the minute order of January 22, 1954 does not properly reflect the order of Court, the Court now orders that the minute order and jacket entry of January 22, 1954 be corrected nunc pro tunc to show, the Court finds the crime to be Burglary of the 'first degree' instead of the 'second degree'." See Exhibit B (March 7).

The only judgment ever prepared in this case recites that petitioner pleaded guilty to the crime of burglary as charged in Count 1 of the information which the court found

to be burglary of the first degree. See Exhibit A (March 7).

ARGUMENT

I.

THE DISTRICT COURT'S FINDING THAT APPELLANT WAS PROPERLY SENTENCED BY THE CALIFORNIA SUPERIOR COURT FOR HAVING COMMITTED THE CRIME OF BURGLARY IN THE FIRST DEGREE WAS PROPER.

The superior court of California being a court of general jurisdiction, has the power after final judgment and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel, or the court itself so that such records will conform to and speak the truth. It is well settled that orders may be made correcting judgments nunc pro tunc as of their original date without notice and on the court's own motion so as to make them conform to the judicial decision actually made and this regardless of the lapse of time. Meyer v. Porath, 113 Cal.App. 2d 808, 811, 248 P.2d 984, 985-986 (1952). And, when such an occasion arises courts not only have the power to amend such orders and judgments, but are under the definite and manifest legal duty to do so. In re Roberts, 200 Cal.App.2d 95, 97 19 Cal. Rptr. 147, 149 (1962).

It is clear from the wording of the minute order of March 11, 1954, that through "clerical inadvertence," the minute order of January 22, 1954 did not properly reflect the order of the court. Full power in the first instance to determine the character of the error as clerical resides in the trial court, and in the absence of clear showing to the contrary its determination is final. Carpenter v. Pacific

Mutual Ins. Co., 14 Cal.2d 704, 96 P.2d 796 (1939). The superior court has the power on its own motion to correct errors caused by oversight, neglect or accident. Robson v. Superior Court 171 Cal. 588, 590-93, 154 P.2d 8, 9-10 (1915); People v. Curtis, 113 Cal. 68, 71, 45 P. 180, 181 (1896); Wiggins v. Superior Court, 68 Cal. 398, 9 P. 645 (1886).

California Penal Code section 460, defines the degrees of burglary and provides in pertinent part as follows:

> "Every burglary of an inhabited dwelling house . . . committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person. . . who while in the commission of such burglary assaults any person, is burglary of the first degree."

The reporter's transcript of the testimony presented at appellant's preliminary hearing shows that the burglary herein involved was committed during the nighttime, that the dwelling house was inhabited by Victoria Logan and her son Tommy Logan, and that appellant assaulted Victoria Logan and her husband J. C. Logan. See Exhibit C (July 5).

Hence, upon petitioner's plea of guilty entered on January 22, 1954, to the charge of burglary the trial judge could not have found otherwise than that the burglary was first degree. Wherefore, it was within the power of the court to correct the minute order of that date to reflect that finding.

Petitioner's argument assumes that he commenced to serve a valid sentence for burglary second degree and there-

fore, the superior court could not change the degree of the crime so as to increase his punishment. However, according to California law, petitioner's sentence could not commence until he was delivered to the Director of Corrections. See Calif. Pen. Code § 2900.

Appellant's petition filed with the district court concedes that he was returned to the court within thirty minutes of the initial sentencing. Hence, it is clear that appellant would not be entitled to the relief he seeks upon the grounds asserted because he had not yet begun to serve his sentence and therefore, the superior court had the power to correct its minute order and resentence appellant correctly. See People v. Thomas, 52 Cal.2d 521, 531, 342 P.2d 889, 894-895 (1959) (discussing United States v. Benz, 282 U.S. 304 (1931)).

II.

THE DISTRICT COURT LACKED JURISDICTION TO GRANT PETITIONER THE RELIEF FOR WHICH HE PRAYED.

Petitioner commenced service of his sentence on March 18, 1954. If as he contends he was convicted on a plea of guilty to second degree burglary rather than first degree burglary he would not be entitled to his immediate release. Second degree burglary is punishable in California by imprisonment in the state penitentiary for a period of not less than one nor more than fifteen years. See Calif. Pen. Code § 461. Therefore, petitioner would not be entitled to his release until March 18, 1969 even if his contentions were decided in his favor.

Furthermore, petitioner was a fugitive for one year and seven days following his parole revocation in 1964 and hence would not be eligible for discharge pursuant to a second degree burglary conviction until March 25, 1970. See Exhibit E (July 5).

Therefore, since even if all the contentions raised by appellant's petition were resolved in his favor he would not be entitled to his immediate release, the District Court lacked jurisdiction to grant the relief for which he prayed. McNally v. Hill, 293 U.S. 131 (1934).

CONCLUSION

The state has full control over the procedure in its courts, both in civil and criminal cases; subject only to the qualification that such procedure must not work a denial of fundamental rights, nor conflict with specific applicable provisions of the federal constitution. Murphy v. Massachusetts, 177 U.S. 155 (1900). Since the trial court followed state procedures which do not conflict with specific applicable provisions of the federal constitution, no grounds for relief in federal habeas corpus have been stated. See Sampsell v. California, 191 F.2d 721, 725 (9th Cir. 1951), cert. denied, 342 U.S. 929 (1952).

DATED: December 26, 1967

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: December 26, 1967

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